83-1617

CASE NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LINWARD COLEMAN,

Petitioner,

vs.

AMERICAN CYANAMID COMPANY,

Respondent,

vs.

RABEY ELECTRIC COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

For Petitioner:
THOMAS R. TAGGART
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Savannah, GA 31412
(912) 236-6949

CASE NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LINWARD COLEMAN,

Petitioner,

vs.

AMERICAN CYANAMID COMPANY,

Respondent,

vs.

RABEY ELECTRIC COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

QUESTION PRESENTED FOR REVIEW

The issue is whether the District Court erred in granting Respondents' motions for summary judgment where respondent American Cyanamid Company was given "statutory employer" status under the Georgia Workers'

Compensation Act and was therefore immune from tort suit within the meaning of the Georgia Workers' Compensation Act, where the Georgia Court of Appeals has recently overruled the cases that the District Court relied upon in its order granting summary judgment to Respondents.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS

The opinions of the District Court for

the Southern District of Georgia were not reported. The Opinion of the Court of Appeals for the Eleventh Circuit is not reported. Both are contained in the appendix.

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit was made and entered on November 29, 1983, a copy is attached hereto in the appendix. A Petition for Rehearing was denied by Order dated January 3, 1984, a copy of said Order is attached hereto in the appendix. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 2101(c).

STATUTES INVOLVED

Official Code of Georgia Ann. § 34-9-8 (a) (Michie, 1982) provides as follows:

A principal, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors engaged

upon the subject matter of the contract to the same extent as the immediate employer.

Official Code of Georgia Ann. § 34-9-11 (Michie, 1982) provides as follows:

The rights and the remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service, or death; provided, however, that no employee shall be deprived of any right to bring an action against any third-party tort-feasor, other than an employee of the same employer or any person who, pursuant to a contract or agreement with an employer, provides workers' compensation benefits to an injured employee, notwithstanding the fact that no common-law master-servant relationship exists between the injured employee and

and the person providing the benefits.

STATEMENT OF THE CASE

This case arose as a result of an injury to Petitioner, Linward Coleman, hereinafter referred to as "Petitioner" while in the employ of Respondent, Rabey Electric Company, Inc., hereinafter referred to as "Rabey", as a high voltage electrical lineman. Respondent Rabey Electric, had contracted with Respondent American Cyanamid Company, hereinafter referred to as "Cyanamid", to "furnish all of the necessary supervision, labor, equipment, and materials required to repair the Number Seven (7) Substation Feeder, as per Specification No. 4527-POD, using stainless steel basking wire and machine." (Record on Appeal, hereinafter referred to as "R", at 81.) The contract was to be performed at Cyanamid's Savannah Plant.

The contract designated Rabey as the

"Contractor" and the contractor was responsible for the manner and method of performing the work and the direction of all persons engaged in the work. Further, the contract called for Rabey to maintain the statutory minimum limits of workers' compensation insurance required by Georgia law. (R-87). Certificates of insurance were to be furnished to Cyanamid prior to the commencement of the work. (R-87). The contract also required that Rabey indemnify and hold harmless Cyanamid for any loss, claims, demands, or causes of action for injuries or death resulting from the performance of the contract, except those damages caused by the sole negligence of Cyanamid. (R-88). The contract price was Five Thousand Five Hundred Thirteen Dollars ($5,513.00). (R-83).

On or about September 16, 1980, petitioner was working on the substation at Cyanamid's Savannah Plant and due solely to

the negligence of Cyanamid, petitioner suffered severe electrical burns, shock, and other serious injuries.

American Cyanamid and its subsidiaries are engaged primarily in the manufacture and sale of a highly diversified line of agricultural, medical, specialty, consumer, and other chemical products. American Cyanamid is not, nor was it at the time of petitioner's injuries, engaged in the electrical contracting business.

On June 24, 1982, petitioner filed the instant case against Cyanamid alleging negligence in the operation, maintenance, construction and design of the high voltage electrical substation which ran Cyanamid's Savannah Plant. Cyanamid was served pursuant to law on June 28, 1982. A stipulation and order was entered by the United States District Court, Southern District of Georgia, Judge B. Avant Edenfield, and the parties extending the time for filing of defensive

pleadings. On July 29, 1982, Cyanamid filed its answer denying the allegation of respondent's complaint. On August 9, 1982, Cyanamid filed its third-party complaint against Rabey on the basis of the indemnity clause contained in the contract between Rabey and Cyanamid. Rabey was duly served and filed a timely answer to Cyanamid's third-party complaint.

On November 5, 1982, Rabey filed its motion for summary judgment alleging that Cyanamid was a "statutory employer" under the Georgia Workers' Compensation Act and any suit against Cyanamid, the owner of the premises in the contract between Cyanamid and Rabey, was barred under the Georgia Workers' Compensation Act pursuant to a recent decision of the Georgia Court of Appeals, Godbee v. Western Electric Co., 161 Ga. App. 731, 288 S.E. 2d 881 (1982). Rabey's motion for summary judgment was granted against Petitioner by order of the District Court on

April 22, 1982. (Appendix, hereinafter referred to as "A", at 1.). Cyanamid filed a motion based on said order granting summary judgment in favor of Rabey which the District Court also granted on May 18, 1982. (A-19).

On appeal, the Court of Appeals for the Eleventh Circuit affirmed without opinion. Rehearing was denied on January 3, 1984 and this Petition for Certiorari to the Supreme Court of the United States undertaken.

BASIS FOR FEDERAL JURISDICTION BELOW

The District Court for the Southern District of Georgia, Savannah Division, had jurisdiction over this case under 28 U.S.C. § 1332 (a)(1).

ARGUMENT

This Court should review the decision of the District Court and of the Eleventh Circuit Court of Appeals which have erroneously applied controlling provisions of Georgia law

dealing with statutory employer status under the Georgia Workers' Compensation Act, especially in view of a recent en banc decision by the Court of Appeals of Georgia Modlin v. Black and Decker Manufacturing Co., ___ Ga. App. ___ (Case No. 67781 1984) (A-24) decided on March 5, 1984 which overruled all of the cases that the District Court relied upon in granting summary judgment to Respondents.

The Georgia Workers' Compensation Act provides "A principal, intermediate, or sub-contractor shall be liable for compensation to any employee injured while in the employ of any of its subcontractors engaged for the subject matter of the contract to the same extent as the immediate employee." Official Code of Georgia § 34-9-8(a) (Michie, 1982). If statutory employer status is conferred on a party to a contract, that party is immune from tort litigation under Official Code of Georgia §

34-9-11 (Michie, 1982).

Georgia courts have interpreted the definition of "principal", as used in section 34-9-8(a) as meaning the principal contractor and not the principal party for whose ultimate benefit the work is being performed. Evans v. Hawkins, 114 Ga. App. 120, 150 S.E.2d 324 (1966). In Evans, the Georgia Court of Appeals stated:

> It is clear to this court that since the secondary liability imposed under this Code section [34-9-8(a)] is predicated upon the existence of the principal contractor-subcontractor relationship, this provision of the Compensation Act is not intended to cover all employers who let out work on contractor, but is limited to those who contract to perform certain work such as the furnishing of goods and services for another and then sublet, in whole or in part, such work.

Evans, supra, 114 Ga. App. at 122, 150 S.E.2d at 326. This analysis of statutory employer immunity was followed by the Georgia courts in Aetna Casualty & Surety Co. v. Barber, 128 Ga. App. 894, 198 S.E.2d 352 (1973). In Aetna, a

Georgia city contracted with a property owner to build a sewer line into a subdivision. The city subcontracted part of the job and one of the subcontractor's employees was injured. The court held that the city was responsble for compensation benefits. Said the court:

> If the city had determined on its own to run a sewer line some place, using its power of eminent domain, or if it had merely let out a contract as an owner, e.g. to reroute the city hall, then it would not be a principal contractor as defined by Evans.

Aetna, supra, 128 Ga. App. at 896, 198 S.E.2d at 354.

These Georgia cases are consistent with holdings in other jurisdictions that state in order for a party to be designated a statutory employer, the party must have a contractual obligation to another which it then subcontracts to a third party. See: Richardson v. United States, 577 F.2d 133 (10th Cir. 1978); Bright v. Reynolds Metal

Co., 490 S.W.2d 474 (Ky. App. 1973); Thorsheim v. State, 469 P.2d 383 (Alaska 1970).

It was against this background that the Georgia Court of Appeals decided the case of Godbee v. Western Electric Company, Inc., supra. In Godbee, defendant Western Electric owned and operated a cable plant. Western Electric entered into a contract with Godbee's employer to do maintenance in the plant. Godbee worked as a welder for six (6) to seven (7) years before being injured.

The court in Godbee held that "we will not limit Code Ann. § 114-112 (now section 34-9-8(a)) solely to employers who are contractors, subcontractors, or other construction employers. We believe that section pertains to any employer who hires another employer to perform work." 161 Ga. App. at 732, 288 S.E.2d at 882. (emphasis added).

Thus, Godbee extended statutory employer

status, workers' compensation liability and tort immunity to any employer/owner. See Johnson v. Georgia Power Co., 165 Ga. App. 672, 302 S.E.2d 417 (1983); Scoqin v. Georgia Power Co., 165 Ga. App. 2, 299 S.E.2d 84 (1983).

In the instant case, the District Court applied Godbee and its progeny to the facts of this case and granted summary judgment for both respondents. (A-17). The court said that "After Godbee, not only is the one who contracts to perform work within the class of statutory employers, but also included is the one for whom the work is to be performed if that entity is otherwise an employer." (A-13).

After the Court of Appeals for the Eleventh Circuit affirmed the District Court and denied Respondents' Motion for Rehearing, (A-21,22), the Court of Appeals overruled Godbee, Scoqin, and Johnson, in the case of Modlin v. Black and Decker Manufacturing

Co., supra.

In Modlin, the Georgia court considered the case of a plaintiff who was injured while installing an air conditioning system in a textile plant. Modlin was employed by a subcontractor of the general contractor of the plant. The plant's owner moved for summary judgment under Godbee. (A-25).

In reversing the trial court, the Georgia Court of Appeals noted that in deciding Godbee it apparently overlooked Evans v. Hawkins, supra, and stated:

> The construction of O.C.G.A. § 34-9-8(a) in Godbee v. Western Electric Co., supra, however, has continued to result in subjecting an employer/owner to workers' compensation liability as a statutory employer...we now reconsider our previous contruction of O.C.G.A. § 34-9-8 and conclude that that statutory provision applies to contractors and not owners, unless the owner also serves as a contractor.

(A-27). The court also noted that the definition of "principal" in subsection (a) of the statute in question in this case

refers to "principal contractor" and that

> owners or entities merely in possession or control of the premises would not be subject to workers' compensation liability as statutory employers, except in the isolated situation where that party also serves as a contractor for yet another entitity and hires another contractor to perform the work on the premises.

(A-29).

Applying Modlin to the facts of the instant case, Petitioner was an employee of a contractor hired to perform electrical work on a high voltage substation that was located some distance away from the chemical plant. Cyanamid was not the principal contractor with regard to the electrical work, Rabey was. Under Modlin, the result of Rabey's and Cyanamid's summary judgment motion would be completely opposite from the District Court's ruling now that Godbee has been overruled.

It would be a manifest injustice to Petitioner if this Court were to deny

certiorari and not consider this case in lieu of Modlin. It is obvious that there is now no legal basis for the District Court's order granting summary judgment to Respondents Rabey and Cyanamid. Had Modlin been handed down before the Eleventh Circuit Court of Appeals' decision in this case, the District Court undoubtedly would have been reversed.

As the Georgia Court of Appeals stated in Modlin:

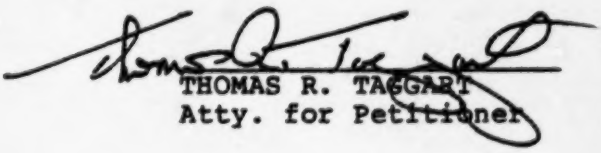
> it wrongs an injured worker to deprive him of his common law remedies against an owner, where the owner's fault causes the injury, merely because the owner also happens to be an employer with three or more employees and the owner has hired a contractor to perform work on its premises.

Since Petitioner's case is strongly affected by the Georgia court's overruling of Godbee and those Georgia cases which flow from the decision in Godbee, Petitioner urges this Court to exercise its discretionary jurisdiction and grant this petition for certiorari in order to consider the District

Court's and Circuit Court of Appeals' ruling in lieu of this most important recent development in Georgia law.

CONCLUSION

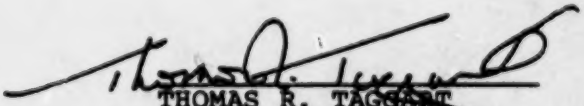
Based on the above reasons, the petition for certiorari should be granted.



THOMAS R. TAGGART
Atty. for Petitioner

CERTIFICATE OF SERVICE

The undersigned attorney for Petitioner hereby certifies that he has served three copies of the foregoing Petition for Certiorari on counsel for Respondent American Cyanamid Company, Walter C. Hartridge, P. O. Box 2139, Savannah, Georgia 31498, and on counsel for Respondent Rabey Electric Co., Inc., I. Gregory Hodges, P. O. Box 8343, Savannah, Georgia 31412, by placing copies in the United States Mail, postage prepaid, on or before this third day of April, 1984.



THOMAS R. TAGGART
Atty. for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

LINWARD COLEMAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CV482-260
	)	
AMERICAN CYANAMID CO. a corporation,	)	
	)	
Defendant and Third Party Plaintiff,	)	
	)	
vs.	)	
	)	
RABEY ELECTRIC CO., INC.,	)	
	)	
Third Party Defendant	)	

ORDER

Before the Court is the motion for summary judgment of third-party defendant Rabey Electric Company, Inc. (Rabey). Said defendant bases its motion on recent developments in Georgia worker's compensation law which it contends are dispositive of this action.

Factual Background

Plaintiff Linward Coleman was injured on September 16, 1980, while he was working for Rabey, his immediate employer on the subject matter of the contractor between Rabey and American Cyanamid Company (Cyanamid). At the time of the injury, plaintiff was employed as an electrical lineman by Rabey. Plaintiff was involved in the repair of the substation feeder at Cyanamid. The contract between Cyanamid and Rabey called for Rabey to furnish all the necessary supervision, labor, equipment and materials. It is disputed whether plaintiff was injured in a building owned by Cyanamid. Rabey contends the injury occurred inside the building. Plaintiff contends that he was injured outside, atop a high voltage line. However, the exact location of the occurrence of the injury is not a fact material to the issue being addressed. It is not disputed that plaintiff

was injured someplace on the Cyanamid premises.

It is also not disputed that Cyanamid and Rabey are both employers within the meaning of the Official Code of Ga. Ann. § 34-9-1 (Michie, 1982) in that they both employ more than three people and are subject to the Georgia Workers' Compensation Act. Plaintiff has received workers' compensation benefits as a result of his injury from Rabey, his immediate employer. On June 24, 1982, plaintiff filed the instant action in this court averring that his injuries were proximately caused by the negligence of American Cyanamid Company. On August 9, 1982, American Cyanamid filed a third-party complaint against Rabey Electric Company, Inc., averring a right of indemnification.

The issue for the Court's determination on this motion for summary judgment is whether such an action is barred by recent develop-

ments in Georgia's law of workers' compensation. It is the opinion of this Court that this action is barred and that Rabey's motion for summary judgment should be granted.

Court's Analysis

Discussion of Georgia

Workers' Compensation Law

The Court has recently had the opportunity to consider this question in McCorkle v. United States, CV482-185 (S.D. Ga. April 14, 1983) (unpublished opinion). The discussion of workers' compensation law in that Order is also relevant here.

Both Cyanamid and Rabey contend that they are statutory employers of the plaintiff within the meaning of Georgia's Workers' Compensation law as explicated in several recent decisions and are, therefore, immune from tort liability under sections 34-9-11

and 34-9-8 of the Code of Georgia, Ga. Code Ann. §§ 114-0103 and 114-112, which provide as follows:

§ 34-9-11

The rights of the remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service, or death, provided, however, that no employee shall be deprived of any right to bring an action against any third-party tort-feasor, other than anemployee of the same employer or any persn who, pursuant to a contract or agreement with an employer, provides workers' compensation benefits to an injured employee, notwithstanding the fact that no common-law master-servant relationship or contract of employment exists between the injured employee and the person providing the benefits.

§ 34-9-8

(a) A principal, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors engaged upon the subject matter of the contract to the same extent as the immediate employer.

(b) Any principal, intermediate, or subcontractor who shall pay compensation under subsection (a) of this Code section may recover the amount paid from any person who, independently of this Code section, would have been liable to pay compensation to the injured

employee or from any intermediate contractor.

(c) Every claim for compensation under this Code section shall be in the first instance presented to an instituted against the immediate employer, but such proceedings shall not constitute a waiver of the employee's right to recover compensation under this chapter from the principal or intermediate contractor. If such immediate employer is not subject to this chapter by reason of having less than the required number of employees as prescribed in subsection (a) of Code Section 34-9-2 and Code Section 34-9-124 does not apply, then such claim may be directly presented to an instituted against the intermediate or principal contractor. However, the collection of full compensation from one employer shall bar recovery by the employee against any others, and the employee shall not collect a total compensation in excess of the amount for which any of the contractors is liable.

(d) This Code section shall apply only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under his control or management.

Until the decision of the Georgia Supreme Court in Wright Associates, Inc. v. Reider, 247 Ga. 496 (1981), an anomalous situation existed with regard to principal contractors who had hired independent subcontractors whose employees were injured in the course of their employment. Not only could the employee of

the independent subcontractor recover workers' compensation benefits from the principal contractor, American Mutual Liability Ins. Co. v. Fuller, 123 Ga. App. 585 (1971), but also the principal contractor could be held liable in tort to the injured employee. BLI Construction Co. v. Knowles, 123 Ga. App. 588 (1971); Blair v. Smith, 201 Ga. 747 (1947). Thus, the quid pro quo rationale underlying the institution of workers' compensation law was not realized in the case of principal contractors who engaged independent contractors. Wright Associates rectified this inconsistency by extending tort immunity to the general contractor as a statutory employer because of the potential liability for workers' compensation benefits to the employee of an independent subcontractor. 247 Ga. at 499. In doing so, the court recognized that the term "subcontractor" as it appears in the Georgia statute is not usually construed

to include independent contractors but declined to adopt the customary exclusion of independnent contractors.

As one commentator has remarked, "[t]he implications are broad, indeed." Potter, Workers' Compensation, Annual Survey of Georgia Law, 34 Mer.L.Rev. 335, 336 (1982). Section 34-9-8(a) applies to principal and intermediate contractors, therefore, "[p]resumably all intermediate contractors in the vertical chain would likewise be entitled to that immunity status pursuant to section 114-112." Under Georgia law, "[a]n employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and in it is not subject to the immediate direction and control of the employer." O.C.G.A. § 51-2-4, Ga. Code Ann. § 105-501. Only in narrowly circumscribed situations would an employer be liable for the torts of an independent con-

tractor. Those instances are set forth in section 51-2-5 of the Official Code of Georgia, Ga. Code Ann. § 105-502:

> An employer is liable for the negligence of a contractor:
>
> (1) When the work is wrongful in itself or, if done in the ordinary manner, would result in a nuisance;
>
> (2) If, according to the employer's previous knowledge and experience, the work to be done is in its nature dangerous to other however carefully performed;
>
> (3) If the wrongful act is the violation of a duty imposed by express contract upon the employer;
>
> (4) If the wrongful act is the violation of a duty imposed by statute;
>
> (5) If the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relations of master and servant or so that an injury results which is traceable to his interference, or
>
> (6) If the employer ratifies the unauthorized wrong of the independent contractor.

By defining "subcontractor" to include independent subcontractor, the Reider court obviously intended to abrogate the effect of

these statutory exceptions insofar as an employment relationship is concerned. The exclusive remedy of workers' compensation thus bars not only tort liability where the injury is caused by an employee of the statutory employer or by an instrumentality under his control but also vicarious liability for the torts of the independent subcontractor which fall within § 51-2-5.

Perhaps the "broadest" concept to emerge from Reider is the basis on which immunity is conferred: potential liability. The court rejected Reider's argument that there was no potential liability because the contract between the statutory employer and the subcontractor provided that the subcontractor would carry workers' compensation insurance and that the statutory employer would be indemnified in the event he had to pay benefits. The court said, "Because Code Ann. § 114-112 gives a right of indemnification

absent a contract, this amounts to an argument that because of the statutory right of indemnification as to compensation benefits, a statutory employer should not be immune from tort liability." 247 Ga. at 499. The purpose of the statutory employer statute, noted the court, was to encourage the statutory employer to contractually require subcontractors to carry workers' compensation insurance. Id. To deny tort immunity because the statutory employer takes care to insure that subcontractors have workers' compensation insurance would defeat the purpose of the statute. Id. at 499-500. In other words, what in reality may appear to be a non-existent potentiality is sufficient to satisfy the statutory requirement, all other elements being present, i.e., the employee must be engaged upon the subject matter of the contract and the injury must have occurred on the premises of the principal contractor's work or which are otherwise under his control or management.

The Georgia Court of Appeals further extended the exclusive remedy bar in Godbee v. Western Electric Company, Inc., 161 Ga. App. 731 (1982), by declining to limit the coverage of the statute "solely to employers who are contractors, subcontractors or other construction employers." Instead, the owner of a business or premises who is also an employer within the meaning of the workers' compensation act is included within the meaning of "principal, intermediate, or subcontractor." O.C.G.A. § 34-9-8, Ga. Code Ann. § 114-112. Before Godbee, a typical scenario would include an owner or customer who would contract for services or goods with a contractor who would frequently subcontract portions of the job. See Evans v. Hawkins, 114 Ga. App. 120, 122 (1966) (§ 114-112 "not intended to cover all employers who let out work on contract but is limited to those who contract to perform certain work, such as the furnishing of goods and services, for another, and then sublet in whole or part such work.").

After Godbee, not only is the one who contract to perform work within the class of statutory employers but also included is the one for whom the work is to be performed if that entity is otherwise an employer. See also Scogin v. Georgia Power Co., _____ Ga. App. ____(1983).

Reider and Godbee are not without limits, however. In Western Electric Co. v.Capes, 164 Ga. App. 353 (1982), cert. granted, the court appeared to focus on the "subject matter of the contract" language in § 34-9-8, holding that the employee of a vending machine company injured while in the course of restocking vending machines on WECO's premises was merely in a contract of purchase relationship as opposed to a relationship of principal and contractor with regard to WECO's manufacturing process. Because "[t]his contract was not a part of the business which WECO was engaged in," the vending machine company was "not a 'subcontractor' of any essential part of that enterprise." Id. at 356. Tort immunity was

thus not available to WECO.

In light of these recent pronouncements of the Georgia courts, plaintiff has advanced two arguments in opposition to the motion for summary judgment. Mr. Coleman first contends that the type of work which he was performing was not an essential part of the manufacturing process as required by Capes, supra. Plaintiff contends that because the business of American Cyanamid is the manufacture of certain chemical compounds for wholesale distribution, not the supply electrical power, his situation should be aligned with that of the plaintiff in Capes, thus barring Cyanamid from occupying the role of statutory employer. However, plaintiff was injured while doing electrical maintenance work on the premises of American Cyanamid where the manufacturing process occurs. This type of maintenance was deemed sufficient in Godbee was reaffirmed in Johnson v. Georgia Power Company, _____ Ga. App. _____ (1983). Johnson was an electrical worker directly employed by Superior Contrac-

tors & Associates, Inc. to do electrical work at Georgia Power Company's Plant Bowen. Johnson was injured, collected workers' compensatin benefits from Superior, and filed a tort claim against Georgia Power. Georgia Power then filed its motion for summary judgment, contending that it was immune from trot liability as a statutory employer. The motion was granted and the Court of Appeals affirmed, wherein it stated:

> In Godbee the business engaged in by the owner was the manufacturing of cables and the contract involved maintenance of the building where they were manufactured; this court concluded that this satisfies all the requirements of a statutory employer....
>
> ...The contract here deals with the installation of equipment which is essential to the manufacturing of electricity. We agree with Georgia Power that if the maintenance of the manufacturing plant is essential to the business enterprise, then the installation of the manufacturing process itself is quintessential to the enterprise. (Emphasis in original).

Plaintiff in the instant case argues that in Johnson, the installation of electrostatic

precipitators in an electrical power plant was part of the essential overall manufacturing process while the activity in which he was involved was not. To hold as plaintiff argues would render menaingless the Reider, Godbee and Johnson cases. While Capes is readily distinguishable from the facts at hand, this Court finds the plaintiff's arguments, while valiantly, made, are nevertheless "distinctions without a difference" in the face of the above line of cases.

Plaintiff's second argument is that questions of fact exist regardng the nature of the relationship between his direct employer and American Cyanamid. Citing Scogin v. Georgia Power Company, ____ Ga. App. _____ (1983), plaintiff argues that the essential questions is whether the owner is a contractor and thus a statutory employer. The Court is asked to make an evaluation of certain factors such as the nature of the work performed, the type of contract between parties, etc. In Scogin, the plaintiff was injured while he was

directly employed by Middle South Constructors as a pipe welder on the Wallace Dam p;roject of Georgia Power Company. Plaintiff received workers' compensation from his direct employer. On appeal from the trial court's award of summary judgment to Georgia Power on plaintiff's suit to recover damages from the same for personal injuries, Scogin argued that a factual question remained as to the nature of the relationship between his direct employer and Georgia Power. The Court of Appeals summarily dismissed this argument as it did in Johnson, supra. This Court sees no need to carry the inquiry any farther.

Conclusion

The facts of the instant case fall squarely within the Reider-Godbee-Scogin-Johnson premutations of the statutory employer statute. Cyanamid is in the position of a statutory employer, thus immune from tort liability on facts such as these. As a consequence, no right of indemnification

against Rabey Electric Company, Inc. exists. Accordingly, when faced with the unequivocal announcements of the Georgia courts, I find that third-party defendant Rabey Electric Company's motion for summary judgment must be granted, as a matter of law.

It is so ordered. This 22 day of April, 1983.

/s/ B. Avant Edenfield
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

LINWARD COLEMAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CV482-260
	)	
AMERICAN CYANAMID CO. a corporation,	)	
	)	
Defendant and Third Party Plaintiff,	)	
	)	
vs.	)	
	)	
RABEY ELECTRIC CO., INC.,	)	
	)	
Third Party Defendant	)	

ORDER

Before the Court is defendant and third-party plaintiff American Cyanamid Company's motion for summary judgment.

It appearing that there is no genuine issue as to any material fact and that the moving party is to a judgment as a matter of law,

It is therefore ordered that judgment be entered in favor of American Cyanamid Company

and this action be dismissed, with prejudice.

SO ORDERED, this 18th day of May, 1983.

/s/ B. Avant Edenfield
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-8349

Non-Argument Calendar

LINWARD COLEMAN,

Plaintiff-Appellant,

versus

AMERICAN CYANAMID COMPANY,
RABEY ELECTRIC COMPANY,

Defendants-Appellees.

No. 83-8440
Non-Argument Calendar

LINWARD COLEMAN,

Plaintiff-Appellant,

versus

AMERICAN CYANAMID COMPANY,

Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Georgia

(November 29, 1983)

Before FAY, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

The judgments are AFFIRMED on the basis of the order of the District Court dated April 22, 1983.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-8349
Non-Argument Calendar

D.C. Docket No. 482-260

LINWARD COLEMAN,
Plaintiff-Appellant,

versus

AMERICAN CYANAMID COMPANY,
RABEY ELECTRIC COMPANY,
Defendants-Appellees.

NO. 83-8440
Non-Argument Calendar

D.C. Docket No. 482-260

LINWARD COLEMAN,
Plaintiff-Appellant,

versus

AMERICAN CYANAMID COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Georgia

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ON PETITION FOR REHEARING
(January 3, 1984)

PER CURIAM:

It is ordered that the Petition for

Rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

67781. MODLIN V. BLACK AND DECKER MANUFACTURING COMPANY, et al.

DEEN, Presiding Judge.

The appellant, Jerry Modlin, sustained spinal injuries following an electric shock from a hand-held drill and a subsequent fall on the premises of the appellee, Swift Textiles, Inc. (Swift). The injury arose out of and was within the scope of the appellant's employment with Bahnson Service Company (Bahnson), a subcontractor of Potter-Shackleford Construction, Inc. (Potter-Schckleford). The appellee Swift had employed Potter-Shackleford, as the general contractor, and the engineering firm of Lockwood-Green Engineer, Inc. (Lockwood-Green) to construct a new textile plant in Columbus, Georgia. The appellant was injured while installing an air conditioning system in the plant under construction.

The appellant received workers' compensation through his immediate employer, Bahnson, and subsequently commenced this action in tort against Swift, Potter-Shackleford, Black and Decker (the manufacturer of the drill), and Lockwood-Green. Swift moved for summary judgment on the grounds that it was a statutory employer under OCGA § 34-9-8 and thereby immune to tort liability, and the trial court granted that motion. On appeal, Modlin contends that Swift does not constitute a statutory employer and urges that Godbee v. Western Electric Co., 161 Ga. App. 731 (288 SE2d 881) (1982) be overruled.

HELD:

OCGA § 34-9-8 (a) provides that "[a] principal, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors engaged upon the subject matter of the contract to the same extent as

the immediate employer." In Godbee v. Western Electric Co., supra at 732, this court vastly expanded the application of this statutory employer provision in holding that "[w]e believe that section pertains to any employer who hires another employer to perform work. A covered employer is one who is engaged in a business and employs three or more employees whether a principal, intermediate, prime or subcontractor...The fact that the covered business also happens to be an owner of a business or premises rather than a contractor should have no impact." A restrictive gloss was subsequently placed upon Godbee in Western Electric Co. v. Capes, 164 Ga. App. 353 (296 SE2d 381) (1982), in which this court held that before a covered employer/owner constituted a statutory employer the work which the owner contracted the employee's immediate employer to perform must be part of the owner's essen- tial, overall business enterprise.

The construction of OCGA § 34-9-8 (a) in Godbee v. Western Electric Co., supra, however, has continued to result in subjecting an employer/owner to workers' compensation liability as a statutory employer. See Scogin v. Georgia Power Co., 165 Ga. App. 2 (299 SE2d 84) (1983); Johnson v. Georgia Power Co., 165 Ga. App. 672 (302 SE2d 417) (1983). We now reconsider our previous construction of OCGA § 34-9-8 and conclude that that statutory provision applies to contractors and not owners, unless the owner also serves as a contractor.

Even prior to Godbee, this court noted that "[t]he terms 'principal contractor' and 'subcontractor' are not expressly defined in the Workmen's Compensation Act and such terms have not been specifically construed in the decisions of this court having application of Code § 114-112 (now OCGA § 34-9-8). However, it is clear to this court that since the secondary liability imposed under this Code

section is predicated upon the existence of the principal contractor -- subcontractor relationship, this provision of the Compensation Act is not intended to cover all employers who let out work on contract but is limited to those who contract to perform certain work, such as the furnishing of goods and service, for another, and then sublet in whole or part such work." Evans v. Hawkins, 114 Ga. App. 120, 122 (150 SE2d 324) (1966). In extending the word "principal" to include "owner", rather than limiting it to "pricipal contractor," this court in Godbee apparently overlooked Evans v. Hawkins, supra, and did not read subsection (a) of OCGA § 34-9-8 in conjunction with the remainder of that statutory provision.

Subsection (c) of OCGA § 34-9-8 provides that a claim for compensation shall first be presented to the immediate employer, but that if the immediate employer is not subject to the Workers' Compensation Act "then

such claim may be directly presented to and instituted against the intermediate or principal contractor." (Emphasis supplied.) Subsection (d) similarly provides that OCGA § 34-9-8 "shall apply only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under his control or management." (Emphasis supplied.) Taking OCGA § 34-9-8 as a whole, the most reasonable conclusion is that the word "principal" in subsections (a) and (b) refers to "principal contractor." Accordingly, owners or entities merely in possession or control of the premises would not be subject to workers' compensation liability as statutory employers, except in the isolated situation where that party also serves as a contractor for yet another entity and hires another contractor to perform the work on the premises.

This conclusion produces the result

most consistent with the apparent legislative intent of the statute and fairest to an owner and an injured worker. An owner who hires a contractor to perform work on the owner's premises is not ordinarily in the position to appreciate and control the risks of injury; the owner ordinarily does not supervise the work; and the owner ordinarily has no input in the hiring practices of the main contractor. Because the contractor, rather than the owner, is in the position to realize and control the risks of injury, it is unfair to subject an owner, merely because he has hired the contractor, to workers' compensation liability. Similarly, it wrongs and injured worker to deprive him of his common law remedies against an owner, where the owner's fault causes the injury, merely because the owner also happens to be an employer with three or more employees and the owner has hired a contractor to perform work on its premises. See Thrash and Blank, Evolution of

the Statutory Employer Rule, 19 G. St. B. J. 172 (1983).

In the instant case, the appellee Swift contracted with Potter-Shackleford and Lockwood-Green to construct a textile plant, in which Swift was to conduct its textile industry. The appellant, as an employee of Bahnson, a subcontractor for Potter-Shackleford, was injured during the installation of an air conditioning system for that textile plant. Swift obviously was not a principal contractor with regard to the construction of its own textile plant, and did not constitute a statutory employer of the injured appellant. The appellant thus could still pursue his common law remedies against Swift as a third party tortfeasor, and the trial court erred in granting summary judgmen. for Swift on the basis that it was a statutory employer.

For the foregoing reasons, Godbee v. Western Electric Co., supra, Scogin v. Georgia

Power Co., supra, and Johnson v. Georgia Power Co., supra, and their progeny are overruled. Because Western Electric Co. v. Capes, supra, modified rather than followed Godbee, it is consistent with what is held here and need not be overruled.

Judgment reversed. McMurray, C.J., Quillian P.J., Shulman, P.J., and Banke, Carley and Pope, JJ., concur. Birdsong and Sognier, JJ., dissent in part and concur in part.

67781. MODLIN V. BLACK AND DECKER MANUFACTURING COMPANY et al.

BIRDSONG, Judge, dissenting in part and concurring in part.

Though I concur with the result reached by the majority (but for entirely different reasons), I must register my dissent to the action overruling Godbee v. Western Electric Co., 161 Ga. App. 731 (288 SE2d 8981) and its progeny.

As I view the utimate, beneficial purpose of OCGA § 34-9-8(a), it is to protect the worker who would otherwise be financially unprotected from work engendered injuries. Thus, the status of an "employer" should not control the right of an employee to recover his economic losses arising out of the faithful performance of his work. That beneficial purpose was served in the case of Godbee v. Western Electric Co., supra. In Godbee, Western Electric operated a cable

factory. It is not unreasonable for a manufacturer of electric cable not to expend its capital assets upon building maintenance or janitorial service. It also is inescapable that the maintenance of the structural suitability and cleanliness of the business premises is essential to the continued profitable operation of the underlying business. Thus, Western Electric perforce was required to undertake those functions itself or make arrangements for it to be done. This reflects the exact situation in Godbee. Godbee had been performing maintenance work in Western Electric's cable factory for eight years.

Furthermore, it hardly needs stating that if Godbee's immediate employer had not been required to carry workers' compensation or had failed to procure the same contrary to its obligation so to do, the next level or highest level employer assumed that responsibility. If this is not true, then the

statutory employer requirements are rendered meaningless and nugatory. We also concluded that where the ultimate employer is an "owner" not engaged in a business and is seeking a temporary service (e.g., the building of a house), such an owner is not an "employer" within the meaning of the Workers' Compensation Act. But where the "owner" is an organized business and is or should be covered by the Workers' Compensation Act in its own right, and where that "owner" employs others to do work which it otherwise would be required to perform in the performance of its business, the mere fact the employer is an owner should not preclude a finding that the owner is also a statutory employer. When Godbee is read in conjunction with Western Electric Co. v. Capes, 164 Ga. App. 353 (296 SE2d 381) and the law applied to the facts in Godbee, such is the implicit holding of Godbee. I find it wholly unnecessary and

contratry to the beneficial purpose of the statutory employer statute to so literally interpret OCGA § 34-9-8 as to exclude arbitrarily from the definition of a statutory employer one who happens to be the owner of a business also subject to the Workers' Compensation Act.

Applying the principles enunciated to the present case, it is apparent Swift Textiles is a business covered by workers' compensation. Nevertheless, a textile business, as an owner, is not engaged in the business of construction of buildings. Thus, Swift Textiles is in the same position as a homeowner, i.e., is not a statutory employer within contemplation of the Workers' Compensation Act, not solely because it is an owner but because as an employer it falls within the exception implicitly recognized in Godbee and specifically explicated in Western Electric Co. v. Capes, supra, i.e., the construction of a building is not a part of the conduct of

a textile business. For the reasons enunciated I concur with the result reached, but dissent to that part of the decision overruling Godbee v. Western Electric Co., supra and its progeny, as limited by Western Electric Co. v. Capes, supra.

I am authorized to state that Sognier, J., joins in this opinion of concurrence and dissent.